

**Supplemental Letter of Findings: 04-20110572**  
**Gross Retail Tax**  
**For the Years 2008 and 2009**

**NOTICE:** Under IC § 4-22-7-7, this document is required to be published in the Indiana Register and is effective on its date of publication. It shall remain in effect until the date it is superseded or deleted by the publication of a new document in the Indiana Register. The publication of the document will provide the general public with information about the Department's position concerning a specific issue.

**ISSUE**

**I. Ten-Percent Negligence Penalty.**

**Authority:** IC § 6-8.1-5-1(c); IC § 6-8.1-10-2.1(a)(3); IC § 6-8.1-10-2.1(a)(2); IC § 6-8.1-10-2.1(d); [45 IAC 15-11-2\(b\)](#); [45 IAC 15-11-2\(c\)](#); Letter of Findings 04-20110572 (March 26, 2012).

Taxpayer asks that the Department exercise its authority to abate the ten-percent negligence penalty.

**STATEMENT OF FACTS**

Taxpayer is an Indiana business which fabricates structural steel parts. The parts include joists, floor decks, stairways, and handrails. The Department of Revenue ("Department") conducted an audit review of Taxpayer's business records. The Department's audit concluded that Taxpayer owed additional sales/use tax. Taxpayer disagreed with a portion of the assessment and submitted a protest to that effect. An administrative hearing was conducted during which Taxpayer's representative explained the basis for the protest. As a result of that hearing, a Letter of Findings ("LOF") was issued in which Taxpayer's position was sustained in part and denied in part. However, one of the issues which Taxpayer raised in its initial protest letter was not addressed in the LOF. The LOF failed to address the ten-percent "negligence" penalty. This Supplemental Letter of Findings has been prepared to address that omission.

**I. Ten-Percent Negligence Penalty.**

**DISCUSSION**

Taxpayer maintains that the Department should abate the penalty on the ground that the Taxpayer has demonstrated that the "underpayment was the result of reasonable cause." Taxpayer bases this assertion on the ground that Taxpayer "consult[ed] with a third party CPA in determining its sales/use tax obligations" and that Taxpayer followed that advice "during the audit period and prior audits."

IC § 6-8.1-10-2.1(a)(3) requires that a ten-percent penalty be imposed if the tax deficiency results from the taxpayer's negligence. IC § 6-8.1-10-2.1(a)(2) requires a ten-percent penalty if the taxpayer "fails to pay the full amount of tax shown on the person's return on or before the due date for the return or payment."

IC § 6-8.1-10-2.1(d) states that, "If a person subject to the penalty imposed under this section can show that the failure to... pay the full amount of tax shown on the person's return... or pay the deficiency determined by the department was due to reasonable cause and not due to willful neglect, the department shall wave the penalty."

Departmental regulation [45 IAC 15-11-2\(b\)](#) defines negligence as "the failure to use such reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer." Negligence is to "be determined on a case-by-case basis according to the facts and circumstances of each taxpayer." Id.

IC § 6-8.1-10-2.1(d) allows the Department to waive the penalty upon a showing that the failure to pay the deficiency was based on "reasonable cause and not due to willful neglect." Departmental regulation [45 IAC 15-11-2\(c\)](#) requires that in order to establish "reasonable cause," the taxpayer must demonstrate that it "exercised ordinary business care and prudence in carrying out or failing to carry out a duty giving rise to the penalty imposed...."

Under IC § 6-8.1-5-1(c), "The burden of proving that the proposed assessment is wrong rests with the person against whom the proposed assessment is made." An assessment – including the negligence penalty – is presumptively valid.

In determining whether or not Taxpayer acted with the "reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer," it is useful to review the context in which Taxpayer found itself owing additional sales/use tax. That context is set out in the prior LOF as follows:

Taxpayer was advised that it incurred neither sales nor use tax on the construction materials and that it could sell the structural steel components without collecting sales tax. Sister corporation was advised that it was not required to pay sales tax when it purchased the structural steel components because it was entering into "inter-company" transactions. Sister corporation was advised that it was not required self-assess sales tax on the structural steel components because it was incorporating the structural steel components into its customers' real property. Sister corporation was advised that it was not required to collect sales tax from its customers because it was charging those customers pursuant to a lump-sum contract. In effect, Taxpayer was advised that – unlike its competitors – Taxpayer and sister corporation entered into a mutually beneficial relationship which allowed both Taxpayer and sister corporation to entirely avoid all sales and use tax on construction materials and structural steel components. Taxpayer received bad advice. Letter of Findings

04-20110572 (March 26, 2012).

It should be noted that Taxpayer acted on that "bad advice." As a result, the assessment of the additional tax was based – at least in part – on Taxpayer and its sister corporation's aggressive tax planning strategy. Although Taxpayer may well have arrived at this strategy after consulting with its third-party CPA, Taxpayer was ultimately responsible for the consequences. Based on a "case-by-case" analysis and after reviewing "the facts and circumstances of each taxpayer" the Department is unable to agree that Taxpayer acted as an "ordinary reasonable taxpayer," that it exercised "ordinary business care," or that abatement of the penalty is justified.

**FINDING**

Taxpayer's protest is respectfully denied.

*Posted: 05/30/2012 by Legislative Services Agency*

An [html](#) version of this document.